

**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

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2005 MAR -4 A 9: 23

**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

MUR: 5488

COMPLAINT FILED: July 21, 2004

DATE OF NOTIFICATIONS: July 28, 2004

February 9, 2005<sup>1</sup>

DATE ACTIVATED: November 18, 2004

EXPIRATION OF SOL: June 1, 2009

COMPLAINANT:

John Truscott

RESPONDENTS:

Brad Smith for Congress and  
James Bailey, in his official capacity as Treasurer;  
and  
Bradley Smith.

RELEVANT STATUTES:

2 U.S.C. § 441a(a)(1)(A)

2 U.S.C. § 441a(d)

2 U.S.C. § 441a(f)

2 U.S.C. § 441a-1(a)(1)

2 U.S.C. § 441a-1(a)(2)

2 U.S.C. § 441a-1(a)(2)(B)(ii)

11 C.F.R. § 400.41

11 C.F.R. § 400.10

11 C.F.R. § 400.30(b)(1), (2)

11 C.F.R. § 400.30(d)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

**I. INTRODUCTION**

This matter concerns allegations that Brad Smith for Congress and James Bailey, in his official capacity as Treasurer ("the Committee"), and Bradley Smith improperly claimed

<sup>1</sup> Bradley Smith was notified in his personal capacity on February 9, 2005. On February 17, 2005, Mr. Smith advised this Office that he was making no response other than to join in the response previously submitted on behalf of his primary campaign committee, Brad Smith for Congress, on September 14, 2005.

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1 eligibility for increased contribution limits under the so-called "millionaires' amendment" of the  
2 Bipartisan Campaign Reform Act, and subsequently accepted contributions in excess of legal  
3 contribution limits.<sup>2</sup> Respondents improperly deducted the amount of a repaid personal loan  
4 from the aggregate total of candidate Brad Smith's expenditures from personal funds in  
5 calculating the Opposition Personal Funds Amount ("OPFA") used to determine eligibility for  
6 higher limits under 11 C.F.R. § 400.41. Respondents consequently accepted \$40,500 in  
7 contributions in excess of the normal limits under a mistaken claim to higher than normal limits.  
8 Accordingly, this Office recommends the Commission find reason to believe Brad Smith for  
9 Congress and James Bailey, in his official capacity as Treasurer, and Bradley Smith violated  
10 2 U.S.C. § 441a(f) by accepting excessive contributions.

## 11 **II. FACTUAL AND LEGAL ANALYSIS**

### 12 **A. Factual Background**

13 Brad Smith for Congress ("the Committee") is the principal campaign committee for  
14 Bradley Smith, who ran in the Republican primary for Michigan's 7th Congressional District in  
15 the 2004 election. James Bailey was the Committee's treasurer at all relevant times. Mr. Smith  
16 personally lent the Committee \$100,000 on September 30, 2003. On March 31, 2004, Mr. Smith  
17 lent the Committee another \$40,000.<sup>3</sup> Resp. at 1.

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<sup>2</sup> Both the statute and the regulations create special personal obligations for candidates in connection with calculating eligibility for and accepting contributions under the increased limits. The Act states that "*a candidate* and the candidate's authorized committee shall not accept any contribution ... under the increased limit until ..." 2 U.S.C. § 441a-1(a)(3). The regulations also state that "*the candidate* and the candidate's authorized committee must calculate the" OPFA. 11 C.F.R. § 400.30(b)(1). Mr. Smith was involved in calculating his OPFA, placed a call to RAD to discuss the proper formula, and signed the Form 11.

<sup>3</sup> As of December 31, 2003, for the purpose of calculating the OPFA under one of the relevant formulas, Respondents' aggregate gross receipts minus any contributions or loans by Smith from personal funds appear to have been between \$89,000.38 and \$100,722.38. The Form 3Z-1, which reflects the exact amount of his gross receipts minus personal expenditures for the primary election, was incomplete. RAD sent an RFAI and the Committee filed

1 Gene DeRossett, one of Mr. Smith's opponents in the Republican primary election, had  
2 loaned his own campaign a total of \$451,000 out of his personal funds by March 31, 2004.  
3 DeRossett made loans to his campaign from personal funds in the following amounts and on the  
4 following dates: (1) \$57,000 on April 8, 2003; (2) \$139,000 on June 26, 2003; (3) \$25,000 on  
5 December 30, 2003; and (4) \$230,000 on March 31, 2004.<sup>4</sup> On April 19, 2004, Mr. DeRossett's  
6 campaign filed the 24-Hour Notice of Expenditures from Personal Funds (FEC Form 10)  
7 disclosing total expenditures of \$451,000.<sup>5</sup> See 11 C.F.R. § 400.21(b).

8 Respondents, who subsequently used Mr. DeRossett's personal loans as the basis for  
9 claiming eligibility for higher limits under the millionaires' amendment, are unsure of whether  
10 they received a copy of Mr. DeRossett's April 19, 2004 Form 10.<sup>6</sup> Resp. at 3, n.2. On April 22,  
11 2004, The Committee repaid Mr. Smith \$50,000 of the \$140,000 he had previously lent.<sup>7</sup>  
12 Respondents state that they had constructive knowledge of Mr. DeRossett's Form 10 sometime  
13 in May when they viewed a copy of the form on the FEC website. Resp. at 2. Although  
14 Respondents state that Mr. Smith signed and faxed the FEC Form 11 (Notice of Opposition

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two amendments to the Form 3Z-1, neither of which appears to be correct. Therefore, this Office can only determine that Respondents' gross receipts minus the candidate's personal expenditures for the year-end 2003 were between \$89,000.38 and \$100,722.38.

<sup>4</sup> As of December 31, 2003, DeRossett's aggregate gross receipts minus any contributions or loans by DeRossett from personal funds equaled \$223,215.37.

<sup>5</sup> Mr. DeRossett actually crossed the threshold on March 31, 2004 and was 19 days late filing the Form 10. RAD sent an RFAI to Mr. DeRossett on May 4, 2004 to which Mr. DeRossett responded on June 2, 2004.

<sup>6</sup> Because Respondents were not eligible for increased limits, it is not necessary to evaluate this claim

<sup>7</sup> On April 19, 2004, apparently unrelated to DeRossett's filing the Form 10 on the same date, Club for Growth endorsed Brad Smith. The response states that as a result of this endorsement, Smith expected to receive "substantially increased individual contributions to his campaign," and therefore decided that his Committee could repay part of his loan. Resp. at 2.

Personal Funds Amount) to the Commission on June 11, 2004, according to the Commission's records, Mr. Smith's FEC Form 11 was received on June 15, 2004.<sup>8</sup> Resp. at 3. Acting pursuant to their claimed eligibility for higher limits, Respondents accepted \$40,500 in contributions that exceeded the standard \$2,000 limit between June 10, 2004 and August 2, 2004. See Attachment 1.

**B. Analysis**

Pursuant to the "millionaires' amendment" to the Bipartisan Campaign Reform Act of 2002, a candidate for the U.S. House of Representatives might be permitted to raise contributions under special increased contribution limits if he or she has an opponent that has spent more than \$350,000 of personal funds on his or her campaign. 2 U.S.C. § 441a-1(a). In order to determine whether the candidate is eligible for increased contribution limits, the candidate must compute the "opposition personal funds amount" ("OPFA"). Only if the OPFA exceeds \$350,000 is the candidate eligible for increased contribution limits. *Id.*

**1. Formula for Calculating OPFA**

In describing the OPFA, the Act provides that:

- (A) *In general.* The opposition personal funds amount is an amount equal to the excess (if any) of --
- (i) the greatest aggregate amount of expenditures from personal funds (as defined in subsection (b)(1)) that an opposing candidate in the same election makes; over
  - (ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

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<sup>8</sup> As discussed below, the OPFA was incorrectly calculated and the Committee was not eligible for higher limits. Accordingly, there is no reason to reach any conclusion on the issue of whether the Form 11 was either necessary or timely filed

2 U.S.C. § 441a-1(2)(A)(i)-(ii).<sup>9</sup>

The implementing regulations provide different formulas for calculating the OPFA based on the time at which it is being calculated and taking into account funds raised through contributions by each campaign. In this matter, the OPFA was being calculated in June of 2004, the year of the general election, so the applicable calculation was set forth in 11 C.F.R.

§ 400.10(a)(3):

(3) To compute the opposition personal funds amount from February 1 of the year in which the general election is held to the day of the general election, one of the following formulas must be used:

- (i) If  $e > f$ , opposition personal funds amount =  $a - b - ((e - f) \div 2)$ .
- (ii) If  $e \leq f$ , opposition personal funds amount =  $a - b$ .

The variables to be used in the formulas laid out in 11 C.F.R. § 400.10(a) are set forth in 11 C.F.R. § 400.10(b), as follows:

(b) *Variables.* The variables used in the formulas set out in paragraph (a) of this section are defined as follows:

a = Greatest aggregate amount of expenditures from personal funds made by the opposing candidate in the same election.

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<sup>9</sup> In 2 U.S.C. § 441a-1(b)(1)(A)(i)-(ii), the Act defines "expenditure from personal funds" as:

- (i) an expenditure made by a candidate using personal funds, and
- (ii) a contribution or loan made by a candidate using personal funds or a loan secured using such funds to the candidate's authorized committee

In 11 C.F.R. § 400.4(a)(1)-(4), the implementing regulations further define "expenditure from personal funds" as.

- (a) the aggregation of all the following:
  - (1) An expenditure made by a candidate, using the candidate's personal funds, for the purpose of influencing the election in which he or she is a candidate;
  - (2) A contribution or loan made by a candidate to the candidate's authorized committee, using the candidate's personal funds;
  - (3) A loan by any person to the candidate's authorized committee that is secured using the candidate's personal funds; and
  - (4) Any obligation to make an expenditure from personal funds that is legally enforceable against the candidate

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b = Greatest aggregate amount of expenditures from personal funds made by the candidate in the same election. ...

e = Aggregate amount of the gross receipts of the candidate's authorized committee minus any contributions by the candidate from personal funds as reported under 11 CFR 104.19(b)(2)(v) or (vi), during any election cycle that may be expended in connection with the election for the nomination for election, or election, to Federal office sought, as determined on December 31 of the year preceding the year in which the general election is held.

f = Aggregate amount of the gross receipts of the opposing candidate's authorized committee minus any contributions by that opposing candidate from personal funds as reported under 11 CFR 104.19(b)(2)(v) or (vi), during any election cycle that may be expended in connection with the election for the nomination for election, or election, to Federal office sought, as determined on December 31 of the year preceding the year in which the general election is held.

Because DeRossett's aggregate gross receipts minus any contributions or loans made by him to his campaign committee as of December 31, 2003 (variable "f") were higher than Respondents' corresponding figures (variable "e"), Respondents correctly used the "a-b" formula in 11 C.F.R. § 400.10(a)(3)(ii) for calculating the OPFA. In that formula "a" would be Mr. DeRossett's greatest aggregate amount of personal expenditures for his campaign and "b" would be Mr. Smith's greatest aggregate amount of personal expenditures for his campaign. *See* Definitions of Variables "a" and "b" in 11 C.F.R. § 400.10(b).

Rather than using the full \$140,000 in personal loans, Respondents based their calculation on the net amount of personal expenditures. By subtracting the \$50,000 repayment from the \$140,000 total that Smith had loaned his campaign and using the net amount of \$90,000 as variable "b" in calculating the OPFA, Respondents concluded that the OPFA was \$361,000,

1 which would allow Mr. Smith to accept increased contribution limits under the millionaires'  
2 provision.<sup>10</sup> Resp. at 4.

3 Bradley Smith himself called RAD on June 10, 2004, and RAD's telephone log notes that  
4 Respondents had a question about whether they were allowed to subtract the repayment from  
5 Smith's loans to his Committee in calculating the OPFA. The RAD analyst informed  
6 Respondents that she would have to research the issue and would not be able to call Respondents  
7 back until June 15, 2004.<sup>11</sup> Respondents, however, did not wait for RAD to call them back  
8 before accepting contributions under the increased limits on June 10, 2004. Respondents  
9 completed the FEC Form 11 on June 11, 2004. The form was received by the Commission on  
10 June 15, 2004. RAD was not able to reach Respondents when RAD attempted to call back on  
11 June 15, 2004. Respondents did not contact RAD again about their eligibility for higher limits.<sup>12</sup>

12 Complainant argues that Mr. Smith was not entitled to accept increased contribution  
13 limits, because the OPFA should have been calculated using the greatest aggregate of Mr.  
14 Smith's loans to his campaign, or \$140,000. If the OPFA had been calculated using \$140,000 as  
15 Mr. Smith's greatest aggregate amount of personal expenditures for his campaign, the OPFA  
16 would have been \$311,000. The amount of \$311,000 is below the threshold amount of \$350,000  
17 required by the law; therefore, Complainant argues, Mr. Smith was not permitted to accept  
18 contributions under the increased limits in 2 U.S.C. § 441a-1(a)(1).

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<sup>10</sup> As noted above, the \$50,000 repayment actually was made 3 days after the date on which the DeRossett campaign filed its Form 10 that Respondents claim to not have received

<sup>11</sup> June 10, 2004 was a Thursday, and the RAD analyst had a pre-planned absence on June 14, 2004

<sup>12</sup> It appears that RAD also did not try to contact the Smith campaign after the attempt to reach them on June 15, 2004.

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2. Greatest Aggregate Amount of Expenditures from Personal Funds

Respondents attempt to draw a distinction between the use of the term “greatest aggregate amount” in the description of the opposing candidate’s expenditures from personal funds in 2 U.S.C. § 441a-1(a)(2)(A)(i) and the use of the term “aggregate amount” in the description of the candidate’s expenditures from personal funds in 2 U.S.C. § 441a-1(a)(2)(A)(ii) to argue that the formula established by the implementing regulations, which requires the use of the greatest aggregate amount for both variables “a” and “b,” is invalid.<sup>13</sup> Resp. at 5. As discussed below, this distinction in the statutory language appears to be meaningless. Further, and more importantly, the implementing regulations<sup>14</sup> and the Commission’s subsequent interpretation do not support subtracting repaid loans from the formula used to calculate the OPFA. *See* Advisory Opinion 2003-31. Therefore, Respondents were not permitted to deduct the \$50,000 repayment from the “greatest aggregate amount of expenditures from personal funds made by the candidate” in calculating the OPFA.

The Act and the regulations speak in terms of “aggregate” expenditures, not “net” expenditures. In fact, the regulations state that “an expenditure from personal funds shall be considered to be made on the date the funds are deposited into the account designated by the

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<sup>13</sup> A search of the legislative history surrounding the passage of the Bipartisan Campaign Reform Act of 2002 reveals no discussion of why the drafters of the legislation chose to use “greatest aggregate” in one part and “aggregate” in another. The Explanation and Justification for the Commission’s Interim Final Rules on the millionaires’ amendment clearly indicates that both the opposing candidate and the candidate’s personal expenditures are to be calculated the same and even provide examples in which both candidate’s expenditures are determined in the aggregate. 68 Fed. Reg. 3970 (Jan. 27, 2003). Finally, in the Commission’s February 2003 publication of the Record, the interim final rules implementing the millionaires’ amendment were summarized. In summarizing the calculation of the OPFA with the “a-b” formula, the article states that “a = opponent’s personal funds spending” and “b = candidate’s personal funds spending.” This summarization further indicates that the two are to be calculated the same. Federal Election Commission, Record, Vol. 29/No. 2 (Feb. 2003).

<sup>14</sup> 11 C.F.R. §§ 400.4, 400.10(b).

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1 candidate's authorized committee as the campaign depository, ..., on the date the instrument  
2 transferring the funds is signed, or on the date the contract obligating the personal funds is  
3 executed, whichever is earlier." 11 C.F.R. § 400.4(b). Thus, it would appear that Smith made  
4 "an expenditure from personal funds" on September 30, 2003 when he lent his Committee  
5 \$100,000 and again on March 31, 2004 when he lent his campaign \$40,000.

6 The Commission previously considered "expenditures from personal funds" in the  
7 context of the millionaires' amendment in Advisory Opinion 2003-31. In the so-called Dayton  
8 AO, the Commission confronted the analogous situation of a candidate who stated that he did not  
9 intend to make personal expenditures in excess of the threshold amount but did intend to  
10 personally incur expenses on behalf of his own campaign for which he expected to be  
11 reimbursed. He asked whether, even after reimbursement, the advances would "permanently  
12 constitute an 'expenditure from personal funds' within the meaning of the Millionaires'  
13 Amendment."

14 The Commission concluded that "Senator Dayton's payments from personal funds for the  
15 campaign expenses listed [in his advisory opinion request], will be both expenditures and  
16 contributions ... and thus will constitute expenditures from personal funds within the meaning of  
17 the Millionaire's Amendment." The Commission concluded "the fact that Senator Dayton may  
18 subsequently receive reimbursement from the Committee for these expenses does not change  
19 their character as expenditures from personal funds. Neither the Millionaire's Amendment nor  
20 the Commission rules and forms implementing it contemplate reductions in expenditures from  
21 personal funds." In other words, Senator Dayton could not "back out" the reimbursed expenses

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1 from his "greatest aggregate amount of expenditures from personal funds" even after receiving  
2 the reimbursement.

3 In reaching this conclusion, the Commission determined "the OPFA is calculated using  
4 the 'aggregate amount[s]' of expenditures from personal funds for the candidate and the  
5 opposing candidate ... The word 'aggregate' used as an adjective is defined as a whole, 'or sum;  
6 total; combined' as compared with the adjective 'net' defined as 'remaining after deductions ...'  
7 The Random House Dictionary of the English Language, The Unabridged Edition (1983); see  
8 also Bryan A. Garner, A Dictionary of Modern Legal Usage (2d ed. 1995)." The AO goes on to  
9 state:

10 In addition, Congress provided in one of the variables used for OPFA calculation  
11 for the subtraction of candidate contributions from personal funds. 2 U.S.C.  
12 441a(i)(1)(E)(ii) [also 2 U.S.C. 441a-1(a)(2)(B)(ii)] (definition of "gross receipts  
13 advantage"). Congress did not make a similar provision for the subtraction of any  
14 amounts in the variables for the "[g]reatest aggregate amount of expenditures  
15 from personal funds" made by the candidate or opposing candidate. 2 U.S.C.  
16 441a(i)(1)(D)(i) and (ii) [also 2 U.S.C. 441a-1(a)(2)(A)(i) and (ii)]; see also 11  
17 CFR 400.10(b) (variables a through f).

18 A.O. 2003-31.

19 Thus, like Senator Dayton, Mr. Smith's "greatest aggregate amount of expenditures from  
20 personal funds" included all the expenditures he made on behalf of his campaign, or \$140,000.

21 Accordingly, the OPFA is:

22 
$$451,000 - 140,000 = 311,000.$$

23 Because the correct OPFA is less than \$350,000, Respondents were never entitled to receive  
24 increased contribution limits under 2 U.S.C. § 441a-1(a).<sup>15</sup> As a result, this Office recommends

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<sup>15</sup> This Office makes no recommendation about whether Respondents violated 2 U.S.C. § 441a-1(a)(3), because Respondents were never eligible for the increased contribution limits. If Respondents had been eligible for increased

1 the Commission find reason to believe Brad Smith for Congress and James Bailey, in his official  
2 capacity as Treasurer, and Bradley Smith, in his personal capacity as candidate, violated 2 U.S.C.  
3 § 441a(f) by accepting \$40,500 in excessive contributions, as detailed on Attachment 1.<sup>16</sup>

4 **III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

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contribution limits but had accepted contributions under the increased limits improperly, then Respondents might have violated 2 U.S.C. § 441a-1(a)(3)

<sup>16</sup> There is no indication that any of the contributors that gave under the increased limits knew or had any reason to know that Respondents were not eligible to accept the increased limits. Therefore, this Office is not making any recommendation as to contributor liability.

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IV. RECOMMENDATIONS

- 1) Find reason to believe Brad Smith for Congress and James Bailey, in his official capacity as Treasurer violated 2 U.S.C. §441a(f) by accepting excessive contributions;
- 2) Find reason to believe Bradley Smith, in his personal capacity as candidate, violated 2 U.S.C. §441a(f) by accepting excessive contributions;
- 3) Enter into pre-probable cause conciliation with all Respondents;
- 4) Approve the attached Factual and Legal Analysis;
- 5) Approve the attached Conciliation Agreement; and
- 6) Approve the appropriate letters.

Lawrence H. Norton  
General Counsel

Lawrence Calvert  
Associate General Counsel  
for Enforcement

Date

3/3/05

BY:

Mark Shonkwiler  
Assistant General Counsel

Audra L. Wassom  
Attorney

Excessive Contributions of \$6,000

Date	Name	Contribution Amount	Excessive Amount
6/10/2004	Lobkowitz, Philip	\$6,000.00	\$4,000.00
6/14/2004	Capra, James	\$6,000.00	\$4,000.00
6/18/2004	Daniels, George	\$6,000.00	\$4,000.00
6/18/2004	Kohler, Terry	\$6,000.00	\$4,000.00
6/18/2004	Smeads, Larry	\$6,000.00	\$4,000.00
6/18/2004	Sinquefield Rex	\$6,000.00	\$4,000.00
6/30/2004	Sinquefield, Jeanne	\$6,000.00	\$4,000.00
7/30/2004	Rhodes, Thomas	\$6,000.00	\$4,000.00
8/2/2004	Searle, Dan	\$6,000.00	\$4,000.00
Totals		\$54,000.00	\$36,000.00

Excessive Contributions - More than \$2,000

Date	Name	Contribution Amount	Excessive Amount
6/30/2004	Beznos, Harold	\$2,500.00	\$500.00
7/27/2004	Smith, Diane	\$4,000.00	\$2,000.00
7/30/2004	Conner, Barry	\$2,000.00	
7/30/2004	Conner, Barry	\$2,000.00	\$2,000.00
Totals		\$10,500.00	\$4,500.00
		\$64,500.00	\$40,500.00